No. 113

In the Supreme Court of the United States

OCTOBER TERM, 1952

ROY WEBBER TINDER, JR., *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 20-26) is reported at 193 F. 2d 720. The memorandum opinion of the District Court (R. 14-16) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1951 (R. 26). The petition

for a writ of certiorari was filed on January 17, 1952, and was granted on June 9, 1952 (R. 27). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under 18 U.S.C. [1948 rev.] 1708, the theft of a letter from the mails was a felony, carrying a five-year penalty, or a misdemeanor for which the penalty was one year.

STATUTE INVOLVED

At the time the offense involved in this case was committed, 18 U.S.C. [1948 rev.] 1708 provided:

> Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or
>
> Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for

collection upon or adjacent to a collection box or other authorized depository of mail matter; or

Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both; but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.[1]

STATEMENT

On September 13, 1950, petitioner was convicted, on his plea of guilty pursuant to advice of his counsel, of six offenses in violation of 18 U.S.C. 1708 (R. 1-3). Each count of the indictment charged him with stealing a letter from the mail box of the addressee. The indictment did not contain any allegations with respect to the value of the stolen letters (R. 1-2). Petitioner was sentenced to three years' imprisonment on each count, the sentences to run concurrently (R. 3-4).

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[1] On July 1, 1952, this paragraph of the section was amended by deleting the misdemeanor provision. P.L. 432, 82d Cong., 2d sess., 66 Stat. 314.

After having served almost a year of his term, on August 3, 1951, petitioner filed a motion under 28 U.S.C. 2255 to correct the sentences, contending that the indictment charged misdemeanors under Section 1708, the maximum penalty for which was one year, instead of felonies for which the maximum penalty was five years (R. 11-13). The motion was denied (R. 14-17) and the Court of Appeals affirmed that order (R. 20-26).[2] Both courts below held that the misdemeanor provision of Section 1708 applied only to offenses involving an "article or thing" which had been abstracted or removed from a letter or package, not to offenses involving an intact unit of mail.[3]

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[2] The decision below is in conflict with *Armstrong* v. *United States*, 187 F. 2d 954 (C.A. 9), where it was held that the misdemeanor provision applied to all offenses defined by the section which involved mail matter of the value of $100 or less.

[3] On December 3, 1952, petitioner completed serving his term less good-time deductions and was released on parole. On March 16, 1953, his maximum sentence, as reduced 180 days by operation of 18 U.S.C. 4164, expired, and he was released from parole.

Since petitioner is no longer in either actual or technical custody, the action, viewed as one under 28 U.S.C. 2255, is moot. *United States* v. *Bradford*, 194 F. 2d 197, 200 (C.A. 2), certiorari denied, 343 U.S. 979; *Morgan* v. *United States* (C.A. 2), decided February 6, 1953; *United States* v. *Lavelle*, 194 F. 2d 202 (C.A. 2); *Crow* v. *United States*, 186 F. 2d 704 (C.A. 9); *Lopez* v. *United States*, 186 F. 2d 707 (C.A. 9). But petitioner's motion to correct his sentences may also be considered as having been made under the first sentence of Rule 35, F. R. Crim. P., which provides that "The court may

SUMMARY OF ARGUMENT

The misdemeanor provision of Section 1708 applied only to offenses involving an "article or thing" which had been abstracted from an item of mail. This view is consistent with the literal reading and with the purpose of the statute.

Section 1708 consists of four paragraphs. The first three define offenses and the last one prescribes the penalties for those offenses. Stealing from the mails, which is the first one defined in the section, is divided into two offenses, each separately defined: (1) stealing "any letter, postal

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correct an illegal sentence at any time". This provision continued "existing law" (Rule 35, note). At common law a sentence which the judgment did not support, or any sentence which the face of the record showed to be illegal, could be corrected at any time, for such sentences were void. *United States* v. *Bradford*, *supra*, 194 F. 2d at 200-201; *De Benque* v. *United States*, 85 F. 2d 202 (C.A. D.C.), certiorari denied, 298 U.S. 681; *Gilmore* v. *United States*, 124 F. 2d 537 (C.A. 10), certiorari denied, 316 U.S. 661; *Waldron* v. *United States*, 146 F. 2d 145 (C.A. 6); *Roscoe* v. *Hunter*, 144 F. 2d 91, 92-93; (C.A. 10); *Ruie* v. *King*, 137 F. 2d 495, 499 (C.A. 8); *Lockhart* v. *United States*, 136 F. 2d 122 (C.A. 6); *Hammers* v. *United States*, 279 Fed. 265 (C.A. 5).

According to petitioner's contention, the sentences are not supported by the judgment. Thus, his attack is appropriate under Rule 35 and hence timely. If petitioner is successful in his contention, his conviction will be reduced from a felony to a misdemeanor. Section 82 of the Virginia Code of 1942 renders incompetent to vote any person who has been convicted of "treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery, or perjury". It is possible, therefore, that a justiciable controversy remains in the case. See *Fiswick* v. *United States*, 329 U.S. 211, 220-223.

card, package, bag, or mail" and (2) abstracting or removing "from any such letter, package, bag, or mail, any article or thing contained therein." In defining each of the other offenses, all of the nouns used to designate mail matter involved in these first two offenses are repeated. Thus, on four occasions the words "article or thing" are employed to designate objects of mail matter which are, or at the time of the offense had been, abstracted from a whole unit of mail, while the terms "letter, postal card, package, bag, or mail" are five times used to designate whole units of mail.

The fourth paragraph of the section made all of the offenses felonies with five years' imprisonment as punishment, except that where "the value or face value of any such article or thing does not exceed $100", the offense was a misdemeanor carrying a one-year penalty. Hence, "such article or thing" in the misdemeanor provision referred to the term "article or thing" as repeatedly employed in the first three paragraphs of the section, and the provision was limited to offenses involving an "article or thing" which had been contained in, but removed from, a letter, package, bag, or other whole unit of mail, and did not apply to offenses involving intact units of mail.

There is nothing in the meager legislative history of Section 1708 that indicates a legislative intention contrary to its literal terms.

The distinction made by Congress is a logical one. Where a person steals an object abstracted

from a unit of mail, he knows the value of the object involved in the offense, so that the degree of criminality of his act depends on the value of that object. But where the item involved in the offense is an intact unit of mail, the offender's criminal intent has no relationship to the value of the stolen mail matter.

This distinction is more in accord with the historical position of Congress with respect to mail theft. From 1872 until the 1948 revision, the theft of any letter from the mails was a felony, carrying a penalty of up to five years' imprisonment. It is unlikely that Congress intended to reduce the offense of stealing a letter, which usually has no pecuniary value, to a misdemeanor.

The distinction in the statute is important in a practical way. When something is stolen from the mail it is still possible for the mail to be delivered, but where the entire mail matter is taken, the mail service breaks down at that point. In addition, the theft of an article or thing from mail matter will ordinarily be discovered immediately upon delivery, whereas it will often be difficult to discover the theft of mail itself.

ARGUMENT

The Misdemeanor Provision of Section 1708 Applied Only to Offenses Involving an "Article or Thing" Which Had Been Abstracted or Removed from a Letter or Package, Not to Offenses Involving Intact Units of Mail.

It is the Government's position that the misdemeanor provision of Section 1708 applied only to offenses involving an "article or thing" which the

offender abstracted, or which had been abstracted at the time of the offense, from an item of mail. This view is consistent with the literal reading and with the purpose of the statute.

Section 1708 consists of four paragraphs. The first three define offenses and the last one prescribes the penalties for those offenses. The offenses are: stealing from the mails or otherwise fraudulently obtaining mail matter, destroying mail matter, knowingly receiving stolen mail matter, and knowingly possessing and concealing stolen mail matter. Stealing from the mails, the subject covered by the first paragraph, is divided into two offenses, each separately defined: (1) stealing "any letter, postal card, package, bag, or mail" and (2) abstracting or removing "from any such letter, package, bag, or mail, any article or thing contained therein". In defining each of the other offenses, all of the nouns used to designate mail matter involved in the two "stealing offenses" are repeated, i.e., "any letter, postal card, package, bag, or mail, or any article or thing contained therein". Thus, on four occasions the words "article or thing" are employed to designate objects of mail matter which are, or at the time of the offense had been, abstracted from a whole unit of mail, while the words "letter, postal card, package, bag, or mail" are used five times to designate whole units of mail. In no place in these three paragraphs which define the offenses are the words "article or thing" used to indicate intact

units of mail. And where reference is made to previously mentioned mail matter, the appropriate, and only the appropriate, nouns are carefully repeated. Thus, in defining the offense of abstracting from the mails, reference is made to abstraction from previously mentioned whole units of mail by employing the phrase, "such letter, package, bag, or mail". The term "postal card", which had been mentioned previously but which could not contain any "article or thing", was properly and carefully omitted. Again, in the first paragraph, reference is made to all previously mentioned mail matter by the phrase, "such letter, postal card, package, bag, or mail, or any article or thing contained therein". The fourth paragraph of the section made all the offenses felonies with five years' imprisonment as punishment, except that where "the value or face value of any *such article or thing* does not exceed $100" the offense was a misdemeanor carrying a one-year penalty. (Emphasis added.)

We think the misdemeanor provision did not apply to offenses, as here, involving intact letters, packages, bags, or other whole units of mail. This construction of the statute is its grammatical reading. The word "such" as used in the misdemeanor provision to modify "article or thing" is a relative adjective, thus referring to an antecedent, and it limits the object to the same degree as the antecedent was particularized (Black's Law Dictionary, Third Ed., p. 1674). Hence, "such article or

thing" in the misdemeanor provision refers to the term "article or thing" as repeatedly employed in the first three paragraphs of the section, and the term is limited to offenses involving an "article or thing" which had been contained in, but removed from, a letter, package, bag, or other whole unit of mail. For "article or thing" when used as the antecedent was so particularized or described.

The construction contended for by petitioner that "such article or thing" in the misdemeanor provision refers to all the items of mail matter previously mentioned, is an unnatural one. That very term is repeatedly and consistently employed in the first three paragraphs to designate objects abstracted from whole units of mail, while intact units of mail are carefully and repeatedly designated as "letter, postal card, package, bag, or mail". And, as we have pointed out, where Congress intended, in the first paragraph, to refer back to all these objects, they were all repeated. Thus, not only is "article or thing" as used in the first three paragraphs the grammatical antecedent of that term in the misdemeanor provision, but the careful and accurate selection of terms throughout the section indicates that this limitation of the misdemeanor provision to the offenses involving abstracted articles or things was not inadvertent.

Although it frequently is stated that a penal statute must be strictly construed, this principle does not mean that a statute must be given its nar-

rowest possible meaning; it is satisfied if words are given their fair meaning. *United States* v. *Brown*, 333 U.S. 18, 26; *United States* v. *Giles*, 300 U.S. 41, 49; *Singer* v. *United States*, 323 U.S. 338, 341-342. Cf. *United States* v. *Universal C.I.T. Credit Corporation*, 344 U.S. 218, 221.

Nor is there anything in the meager legislative history of Section 1708 which indicates a legislative intention contrary to its literal terms. Prior to the 1948 revision all the offenses defined by Section 1708 were felonies (Act of February 25, 1925, 43 Stat. 977; Act of August 7, 1939, 53 Stat. 1256, 18 U.S.C. [1940 ed.] 317. The reviser's note simply states that "The smaller penalty for an offense involving $100 or less was added", and refers to the notes under Sections 641 and 645 of the title. This statement says no more than that the misdemeanor provision was added; it does not purport to define the scope of the new provision. The notes under Sections 641 and 645 (which are the first two sections in Title 18 to which a misdemeanor provision was added) merely attempt to justify the addition by the revisers, within the scope of their function, of a misdemeanor provision. See also House Report No. 304, 80th Cong., 1st sess., pp. 2, 7. The reference to these notes, also made in the notes to approximately 27 other sections,[4] was

[4] Although the reviser generally followed a policy of adding misdemeanor provisions to embezzlement and theft statutes because the latest enactment of that type of statute contained such a provision, the misdemeanor provision was not added in

for the purpose of showing the reviser's reason for adding the misdemeanor provision, not to show the scope of that provision.[5]

The distinction made by Congress between an offense involving an intact unit of mail, which is always a felony, and an offense involving objects abstracted from mail, which is graduated on the basis of the value of the object, is a reasonable one. Where a person steals, or buys, or destroys an object abstracted from a unit of mail, he knows the value of the object involved in the offense, so that the criminality of his act depends on the value of that object. But where the item involved in the offense is an intact unit of mail, the offender's criminal intent has no relationship to the value of the objects contained therein, for he does not know their value. He intends to steal whatever of value they may contain. In the latter case, the criminality of the act is not dependent on or related to the value of the concealed objects, and a graduated

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all cases. See, *e.g.*, Sections 153, 660, 1709 of Title 18. Cf. these sections with Sections 645, 648, 653, 654, 656 of the Title where the misdemeanor provision was added. The misdemeanor provision of Section 661 applies only to some of the offenses defined by that section.

[5] The 1952 Senate Committee report (S. Rep. 980, 82d Cong., 1st sess.), relied on by petitioner to support his construction (Br. 10-11), does not purport to deal with an interpretation of the misdemeanor provision, but is only a declaration against the basic policy of making any violation of the statute a misdemeanor. In any event, the Committee's view in 1952 would not, of course, shed any light on the intention of the prior Congress when it enacted the statute in 1948.

penalty would be improper. (Cf. H. Rep. 1674, 82d Cong., 2d sess.).[6]

This distinction, which appears in the literal reading of the section, is fortified by the fact that it is more in accord with the historical position of Congress with respect to mail theft. From 1872 until the 1948 revision of the criminal code the theft of any letter from the mails, without regard to its value, was a felony, carrying a penalty of up to five years' imprisonment. Act of June 8, 1872, Section 281, 17 Stat. 318-319; Revised Statutes (1873-1874), Section 5469; Revised Statutes (1878 ed.) Section 5469; Act of March 4, 1909, Section 194, 35 Stat. 1125; Act of February 25, 1925, 43 Stat. 977; Act of August 7, 1939, 53 Stat. 1256. After 1909, and until the 1948 revision, all of the offenses now defined by Section 1708 were felonies (*ibid.*), and on July 1, 1952, Congress returned to its historic position by deleting the misdemeanor provision from the section, *supra*, p. 3, n. These statutes reflect the traditional attitude of Congress as to strict preservation of the integrity of the mail, especially with respect to communications as

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[6] The provision of Section 1708 making felonies of all thefts of letters and other intact units of mail, while graduating the penalty as to abstractions therefrom on the basis of the value of the abstracted articles or things, is similar in principal to the provisions of a precursor of that section. See Section 281 of the Act of June 8, 1872, 17 Stat. 318 (continued in Section 5469, R.S.), which made it a felony to steal mail regardless of its value, while opening, destroying, embezzling, or fraudulently obtaining mail, were made felonies only if the mail contained something of value.

distinguished from the transportation of property. The sanctity and integrity of the United States mail has long been a source of national pride and a primary factor in the development of a free society.

In the light of this history, it seems unlikely that Congress intended to reduce to a misdemeanor the offense of stealing letters and other correspondence from the mails. Yet the construction contended for by petitioner would have that effect, for a letter, though of perhaps incalculable intangible value to the sender or addressee, usually has no pecuniary value. On the other hand, the distinction made in the literal language of the statute maintains in a very practical way the traditional position of Congress with respect to the theft of letters. The primary purpose of Section 1708 is to punish mail theft where the object of the offender is to obtain valuable property. It is unlikely that such a thief would abstract a valueless letter, while he might take an intact letter in the hope and expectation that it would contain something of pecuniary value. Moreover, when something is stolen from mail it is still possible for the mail to be delivered, but where the entire mail matter is taken, the mail service necessarily breaks down at that point. In addition, the theft of an article or thing from mailed matter will ordinarily be discovered immediately upon delivery, whereas it will often be difficult to discover the theft of mail itself. The theft of mail itself is a more serious threat to the in-

tegrity of the United States mails than the stealing of an "article or thing" from the mails.

The literal reading of the statute, adopted by both courts below, is in closer accord with the historical position of Congress with respect to the theft of letters than that contended for by petitioner. The view placing a broad interpretation on the misdemeanor provision in Section 1708 adopted by the Ninth Circuit in *Armstrong* v. *United States*, 187 F. 2d 954, on which petitioner relies, ignores the historical position of Congress. No Congressional intention to apply the reduced penalty to situations not encompassed by the literal terms of the statute can be found. We submit that the construction placed on the statute by the court below is the only one in accord with the sole expression of Congressional intention, i.e., the language of the statute.

CONCLUSION

We therefore respectfully submit that the judgment of the court below should be affirmed.

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